

SEP 21 1983

ALEXANDER L. STEVAS,
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No. 83-77

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

ATLANTIC PURCHASERS, INC.,
STELLA MARIS INN, LTD.,
Petitioners,

v.

AIRCRAFT SALES, INC.,
DONALD J. ANKLIN,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22 and in accordance with Rules 28 and 33 of the Rules of the Supreme Court of the United States, Atlantic Purchasers, Inc. and Stella Maris Inn, Ltd. ("Petitioners") reply to Aircraft Sales, Inc. and Donald J. Anklin's ("Respondents") Response to Petition for Writ of Certiorari as follows:

I. RESPONDENTS CITE STATUTES WHICH ARE NOT APPLICABLE TO THIS PETITION

Respondents statutory citations are confused and confusing. Respondents cite N. C. Gen. Stat. §§75-1 and 75-16.1 [Response to Petition, p. 2 and 3] as the North Carolina statutes which pertain to this case. On the contrary, neither of those statutes apply. N. C. Gen. Stat. §75-1 is a criminal statute imposing a fine or imprisonment and is not applicable here. N. C. Gen. Stat. §75-16.1, which provides for attorney's fees to be awarded to a prevailing party in the court's discretion, is also cited. Petitioners do not claim in their Petition for Writ of Certiorari to be entitled to attorney's fees under §75-16.1. The Court of Appeals in its decision found, and Petitioners

concede, that Petitioners were not entitled to recover attorney's fees because, as items of special damage, they must be pled specifically under Fed. R. Civ. P. 9(g). Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983) at 716, n. 4. Therefore, neither N. C. Gen. Stat. §§75-1 nor 75-16.1 is applicable.

Beneath the reference to §75-16.1, Respondents actually quote the language of N. C. Gen. Stat. §75-16 which is relevant here and which was quoted and discussed in the Petition for Certiorari. The other North Carolina statute which is involved is N. C. Gen. Stat. §§75-1.1 which also was quoted and discussed in Petitioners' Petition for Writ of Certiorari.

II. AN AWARD OF TREBLE DAMAGES TO PETITIONERS WOULD NEITHER CONSTITUTE "TRIAL BY AFTERTHOUGHT," NOR "TRIAL BY AMBUSH"

Respondents contend that Petitioners are seeking an expansion of the concept of notice pleading under the Federal Rules of Civil Procedure. On the contrary, no expansion of the notice pleading concept is necessary to warrant an award of treble damages to Petitioners in accordance with N. C. Gen. Stat. §§75-1.1 and 75-16. Rather, the concept of notice pleading under the Federal Rules of Civil Procedure and the decisions not only supports but requires an award of treble damages to Petitioners.

Under Fed. R. Civ. P. 8, what is required is that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to

relief." It is notice of the factual basis, as opposed to the legal basis, of the complaint that is required. In this way a defendant is notified of the acts or transactions on the part of defendant which are alleged by plaintiff to entitle him to relief. The court will award appropriate relief if the plaintiff is entitled to it. See, New Amsterdam Casualty Company v. Waller. 323 F.2d 20 (4th Cir. 1963) citing Conley v. Gilison. 355 U.S. 41, 47-48 (1957). This aspect of notice pleading is explicitly recognized in Rule 54(c). It is not "trial by afterthought" to request the relief which is required by the facts alleged in the complaint and proved at trial. Indeed the trial court is required to grant such relief even if it is never requested.

Further, it can hardly be called "trial by ambush" to grant statutory relief where the elements of the common

law tort and the statutory right under which the treble damages remedy is sought are precisely the same. In this case the complaint met the special pleading requirements set forth in Fed. R. Civ. P. 9(b) in pleading fraud and its elements. In addition, evidence sufficient for the jury to return a verdict for fraud was adduced at trial, without opposition by Respondents, and a verdict for fraud was in fact rendered by the jury. Under the law of North Carolina, proof of fraud as a matter of law constitutes a violation of N. C. Gen. Stat. §75-1.1. Hardy v. Tolar, 288 N. C. 303, 218 S.E. 2d 342 (1975). That the defendants failed to fully appreciate the legal consequences of the facts alleged and proved does not excuse them from those consequences. Therefore, to grant the relief provided by statute for conduct which violates the statute cannot be characterized as setting a

defendant up for an ambush.

**III. SPECIFIC STATUTORY RELIEF NEED NOT
BE MENTIONED IN THE COMPLAINT IN ORDER FOR
A COURT TO GRANT SUCH RELIEF**

Respondents assert that N. C. Gen. Stat. §75-16 allows unusual relief to a plaintiff if the specific statutory relief is sought. This position is, however, contrary to black letter law that public statutes need not be pleaded even under the most restrictive pleading systems because they are the subject of judicial notice. 61A Am. Jur. 2d, Pleading §9 (1981). Even the Official Forms appended to the Federal Rules of Civil Procedure illustrating proper pleading of statutory claims do not refer in any way to the statutes creating the claim. [See Table of Official Forms, Form No. 14 and 15] The kind and amount of relief justified is to

be determined by the outcome of the trial and not by the requests made in the pleadings.

IV. AN AWARD OF TREBLE DAMAGES TO PETITIONERS IS NOT PREJUDICIAL OR FUNDAMENTALLY UNFAIR TO RESPONDENTS

Respondents, in fact, were on notice of the potential of having a verdict equal to an award of treble damages assessed against them, by the following:

- 1) The North Carolina statute itself and the decisions of the courts of North Carolina;
- 2) Actual notice of the decision in Hardy v. Tolar, supra, on the part of Respondents' trial counsel (Tr. 267), as well as the allegation of the common law tort of fraud in the Complaint which under Hardy constitutes a violation of N. C. Gen. Stat. §75-1.1; and

3) By the dollar amount of actual damages alleged to be due Petitioners, exclusive of their prayer for punitive damages, in the prayer of the Complaint.

Despite the allegations in the Complaint, Respondents took no discovery in the case, and despite the evidence adduced by Petitioners at trial, Respondents failed to present any evidence. Having been on notice of their potential liability and having failed to do anything to defend against such liability it is difficult to envision how an award of damages in an amount of no more than the prayer for actual damages in the Complaint would be prejudicial or fundamentally unfair to Respondents.

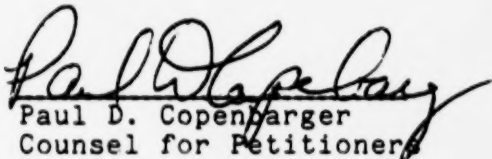
CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and those set forth herein, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1983, three copies of this Petitioner's Reply Brief were mailed, first class, postage prepaid, to counsel for the Respondents, David R. Badger, Esq., Suite 7, Equity Building, 701 East Trade Street, Charlotte, North Carolina 28202. I further certify that all parties required to be served have been served.


Paul D. Copenbarger
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